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No. 86-311

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. RICHARDS, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Merit Systems Protection Board's determination that petitioner was properly removed from federal employment on the grounds that he participated in a strike against the United States and was absent from his duty post without leave.

2. Whether the Federal Aviation Administration is estopped from removing petitioner from federal employment.

3. Whether removal from federal employment is an appropriate penalty for petitioner's participation in an unlawful strike against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A8) is reported at 795 F.2d 1016 (Table). The opinion of the Merit Systems Protection Board (Pet. App. A9-A25) is reported at 17 M.S.P.R. 160.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1986. The petition for a writ of certiorari was filed on August 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former air traffic controller, challenges his removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and subsequent litigation are set forth in our brief in

opposition in *Campbell* v. *Department of Transportation*, cert. denied, 469 U.S. 881 (1984), one of a number of other cases arising out of the strike.[1]

1. The Federal Aviation Administration (FAA) removed petitioner from his position as an air traffic controller on the grounds that he participated in a strike against the United States and was absent without leave during the strike. The Merit Systems Protection Board upheld petitioner's removal (Pet. App. A9-A25). The Board first concluded that a prima facie case against petitioner had been established by evidence demonstrating that petitioner was absent without leave during a strike of general knowledge (*id.* at A9-A10).[2] Petitioner attempted to rebut this showing by introducing evidence that his participation in the strike was involuntary because it was the result of coercion (*id.* at A12-A14).

The Board rejected petitioner's claim that he had been coerced into participating in the strike by the "pressure and verbal abuse from other union members" that he allegedly incurred as a result of his previous open opposition to the strike (Pet. App. A12). It stated petitioner "did not claim that threats of physical violence had been directed to him or that he feared crossing the picket line.

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[1] A copy of our brief in *Campbell* has been sent to counsel for petitioner.

[2] The Federal Circuit has held that the FAA at all times bears the burden of establishing strike participation; it must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). Once the agency makes a prima facie showing of strike participation by presenting evidence of the employee's unauthorized absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing" (*ibid.*).

The non-physical abuse he suffered as a result of his actions opposing the strike did not constitute the kind of duress" necessary to rebut a showing of strike participation (*id.* at A13).[3] The Board also declined to adopt petitioner's argument that his conduct was coerced because he believed that his wife's poor health would be aggravated if he was subjected to the harassment and violence that he thought would accompany an attempt to cross the picket line (*id.* at A13-A14). The Board noted that there was no violence on the picket line and that the situation was monitored by the police. Moreover, petitioner did not advise his employer of his concern about his wife and attempt to obtain approval for his absence (*id.* at A14).

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[3] The Board noted (Pet. App. A13) that the legal standard to be applied in assessing a claim of coerced strike participation was set forth in its decision in *Johnson* v. *Department of Transportation, FAA*, 13 M.S.P.R. 652 (1982), aff'd, 735 F.2d 510 (Fed. Cir. 1984). The MSPB adopted—and the court of appeals approved—a "reasonable man" standard for establishing involuntary participation in a strike. The Board stated that

> in order for a Federal employee charged with participation in a strike against the Government to establish a defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a *threat or other intimidating conduct, directed toward him*, sufficient to instill in him a *reasonable* fear of *physical danger* to himself or others, which a person of ordinary firmness would not be expected to resist.

13 M.S.P.R. at 660 (footnotes omitted; emphasis added). Under this standard, "menacing tones or language, fear of 'financial ruin' or jeopardy to career advancement, exuberant moral suasion, or any vexation, annoyance or pressure resulting in a state of mental perturbation, reluctance to act, or a choice of inherently unpleasant situations" do not standing alone render involuntary an individual's participation in a strike (*id.* at 658-659 (footnotes omitted)).

Petitioner also asserted that the FAA is estopped from removing him from federal employment. He claimed that he offered to resign in June 1981 and did not do so because of comments made by his supervisor that, in petitioner's view, amounted to a commitment to rehire petitioner in the event he was removed for strike participation (Pet. App. A15-A18). The Board concluded that, assuming petitioner relied upon the supervisor's statements, any such reliance was not reasonable. It found that the supervisor encouraged petitioner to report for work in the event of a strike and indicated that petitioner was free to resign and that he would assist in the processing of petitioner's resignation if petitioner chose to resign (*id.* at A19-A20).

The Board further concluded that even if petitioner's reliance could be deemed reasonable in June 1981, when the conversations with his supervisor took place, continued reliance upon the supervisor's comments had become unreasonable by the time of the August 3, 1981 strike. As the deadline for the strike approached, no further discussions took place between petitioner and his supervisor, even though petitioner claimed that he constantly thought about resigning (*id.* at A20). The Board observed that the supervisor had been advised in the interim that there would be no amnesty for strikers. It stated that petitioner "should have been particularly careful to seek and act on current information because he had knowingly decided to engage in illegal conduct" (*id.* at A22). Since petitioner's "continued reliance on a stale conversation was misplaced when he could and should have obtained current information," petitioner "failed to prove a case for estopping his removal" (*id.* at A22, A23).

Finally, petitioner argued that his removal did not promote the efficiency of the FAA because he had been a good employee. The Board rejected this contention, observing that the statutory prohibition against strikes by federal employees "reflects the belief of Congress that

discharging a federal employee for participation in a strike against his employer promotes the efficiency of the service because such misconduct affects both the employee's ability to accomplish his duties satisfactorily and the agency's ability to fulfill its mission" (Pet. App. A23-A24).

2. The court of appeals affirmed the Board's decision (Pet. App. A6-A8).[4] It observed that "[t]he full [MSPB] considered petitioner's case at length * * * and that discussion is adequate to sustain the Board's affirmance of the sanction of removal against him" (*id.* at A7). With respect to petitioner's claim that his participation in the strike was coerced, the court of appeals found that the peer pressure cited by petitioner was no greater than the pressures upon air traffic controllers in two previous cases in which the court had rejected the coercion defense. *Id.* at A8, citing *Johnson* v. *Department of Transportation, FAA, supra*, and *Martel* v. *Department of Transportation, FAA*, 735 F.2d 504 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). The court also concluded that the Board correctly held that "there was no estoppel of the Government arising from [petitioner's] conversations with [his supervisor]" (Pet. App. A7).

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[4] Petitioner's petition for review in the court of appeals was among approximately 3,500 such petitions filed by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those cases. On May 18, 1984, a five-judge panel of the court of appeals issued decisions sustaining the removals of all but one of the petitioners in the lead cases. A number of the unsuccessful petitioners filed petitions for writs of certiorari; all of those petitions were denied by this Court. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984). The court of appeals then lifted the stay and began to consider the other pending petitions for review.

ARGUMENT

Petitioner's basic claim is that the MSPB and the court of appeals erred in concluding that he participated in the illegal strike. The decision of the court of appeals with respect to this fact-bound issue is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioner raises several challenges to the Board's factual finding that he actively participated in the strike. He first contends (Pet. 11-19) that the FAA did not carry its burden of establishing that he participated in the strike. As we discussed in our brief in opposition (at 6-8 & nn. 5-6) in *Campbell* v. *Department of Transportation*, cert. denied, 469 U.S. 881 (1984), direct proof of participation is not required where the employee has not rebutted the agency's prima facie case of strike participation. Here, the FAA established its prima facie case by showing that petitioner was away from his duty post without authorization during a strike of general knowledge. Accord *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). Petitioner's claim therefore must fail unless he rebutted the agency's showing of strike participation.

Petitioner argues (Pet. 18-21) that his showing of coercion was sufficient to rebut the FAA's prima facie case. The Board (Pet. App. A12-A14) and the court of appeals (*id.* at A7-A8) correctly concluded, however, that petitioner did not establish that his conduct was coerced because he did not demonstrate "a threat or other intimidating conduct, directed toward [petitioner], sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist" (*Johnson* v. *Department of Transportation, FAA*, 735 F.2d 510, 513 (Fed. Cir.

1984)).[5] In the absence of a showing of a direct threat of physical harm or any evidence that petitioner or his wife was in any danger, the Board and the court of appeals properly concluded that petitioner's fear was not sufficient to excuse his strike participation.

2. Petitioner's attempt to revive his estoppel defense (Pet. 22-25) is nothing more than an effort to relitigate the question whether his alleged reliance upon his supervisor's statements was reasonable. The resolution of that fact-bound question is not an issue appropriate for review by this Court.

As a threshold matter, of course, it is not clear that an estoppel ever may be asserted against the government. But "the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 (1984); see also *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986), slip op. 9. Petitioner does not dispute that the party asserting an estoppel must reasonably rely upon the other party's conduct (Pet. 24). The Board (Pet. App. A19-A20, A22-A23)—and the court of appeals (Pet. App. A7)—correctly concluded that petitioner's reliance was unreasonable.

3. Finally, petitioner contends (Pet. 25-29) that the penalty of removal is not justified when an employee participates in an unlawful strike against the United States.

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[5] Petitioner appears to contend (Pet. 19-20) that the reasonableness of his belief is not relevant in determining whether his participation in the strike was coerced. But the court of appeals specifically rejected that position in *Johnson*, concluding that strike participation is involuntary only if the fear that led to the participation was objectively reasonable (735 F.2d at 513-515). We discuss the reasons justifying this standard in our brief in opposition (at 10-12) in *Russell* v. *Department of Transportation, FAA*, cert. denied, No. 85-1229 (June 2, 1986). We have supplied a copy of that brief to petitioner's counsel.

We addressed that issue in our brief in opposition (at 10-12) in *Campbell* and this Court denied the petition in that case; our analysis in *Campbell* also applies to petitioner's arguments here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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